

**The New Uniform Representation of Children in Abuse, Neglect, and Custody
Proceedings Act: Bridging the Divide Between Pragmatism and Idealism**

By

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Over the last decade, the important topic of representation of children has received more attention from courts, legislators, and policy makers than ever before.¹ New statutory and rule-based standards for children's lawyers seem to appear almost daily,² and children themselves

¹ The Administration for Children & Families, U.S. Dept. of Health & Human Services, for example, has published guidelines for states, including brief explanations of the role of a child's representative under the Child Abuse Prevention and Treatment Act, codified in part at 42 U.S.C. § 5106a(b)(2)(A)(xiii). See CHILD WELFARE POLICY MANUAL, available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=2 (last visited Oct. 13, 2006). See also ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (2002). Moreover, various professional associations have crafted their own recommended standards for children's representation. See *infra* at notes 130-50 and accompanying text. An influential conference entitled "Ethical Issues in the Legal Representation of Children" was held in 1995 at Fordham Law School and produced a set of recommendations to improve the professional practice of lawyers who serve on behalf of children. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Ford. L. Rev. 1301 (1996) (*Fordham Recommendations*). A ten-year anniversary conference was convened at the University of Nevada Law School in 2006. The Nevada Conference on Representing Children in Families: Children's Advocacy and Justice Ten years After Fordham carried forward the work of the Fordham conference and yielded a further set of recommendations. See *Recommendations of the UNLV Conference on Representing Children in Families*, 6 Nev. L.J. 592 (2006) (*UNLV Recommendations*).

² A few of the new statewide standards that have been recently promulgated include Rule 10, ARIZONA RULES OF FAMILY LAW PROCEDURE, 17B Ariz. Rev. Stat (2006) (describing duties and powers of child's attorney, best interests attorney, and court appointed advisor); Col. Rev. Stat. Ann. § 13-91-103 (2005) (describing role of child's legal representative in domestic relations cases); 29 Del. Code § 9007A (2005) (defining legal representation of children in abuse and neglect cases); 750 Ill. L. C.S. 5/506 (2006) (describing duties of guardian ad litem, attorney, and child's representative in domestic relations cases); Mich. Code L. Ann 712.A.17d (2004) (prescribing duties of lawyer-guardian ad litem). For a summary of recent legislative enactments relating to child representation in abuse and neglect cases, see ABA Center on Children and the Law, Court Improvement Progress Report 2005 National Summary, available at <http://www.abanet.org/child/cipcatalog/home.html> (last visited October 13, 2006).

have become increasingly vocal about wanting a say in decisions that impact them personally.³

The practice of child advocacy has become a specialization for which there is certification, and child advocacy clinics are now commonplace in law schools across the United States.⁴ Other

³See, e.g., Catherine J. Ross, *Voices in the Wilderness: Who is Listening to Dependent Teens*, 6 NEV. L.J. 1362 (2006)(describing studies showing that foster children want voice in court and do not see their lawyers as providing that voice); Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 42 (2004), available at www.pewfostercare.org. (recommending that foster children participate in proceedings impacting their lives).

⁴See Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005)(describing increased respect for field of child representation and legal education's focus on training for child advocacy specialization).

nations, driven largely by the United Nations Convention on the Rights of the Child,⁵ have likewise focused on child representation as a matter of policy reform and law making.

⁵*U.N. Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess. (1989), available at 28 I.L.M. 1448 (1989)(CRC). Article 12 of the CRC is the pivotal provision regarding children's participation:

1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For the purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

For a detailed examination of efforts outside the United States to comply with Article 12, see Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for further Study*, 6 Nev. L.J. 966 (2006)(*How Children are Heard*).

The increased attention to child representation, however, has not produced uniformity in the standards governing children's representatives. Instead, statutory provisions and procedural rules for children's lawyers and guardians ad litem vary dramatically from state to state, and sometimes from county to county within a single state.⁶ Differences abound regarding such fundamental questions as whether a child's lawyer should function as a traditional client-directed lawyer or a best interests advocate, whether courts should always appoint lawyers for children in abuse and neglect proceedings,⁷ whether courts should *ever* appoint lawyers for children in private divorce actions,⁸ and whether guardians ad litem are a help or a hindrance in protecting children's interests.⁹ If judges, lawyers, parents, caregivers, and children are confused about

⁶See Appendix A, *State by State Survey of Child Representation in Abuse and Neglect Cases*; Appendix B, *State by State Survey of Child Representation in Custody Cases*; Jean Koh Peters, *How Children Are Heard*, *supra* note 5 at Appendix C. US State-State Chart. Professors Peters' research, which will also be published in her forthcoming book, JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (3d ed 2006), reveals marked variations across the United States and sometimes within a singlestate.

⁷Compare Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485 (2003) (arguing that child's liberty interests at stake in dependency require appointment of counsel as due process right), with Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006) (suggesting that children's lawyers do more harm than good by too frequently siding with state child protective agencies).

⁸Compare Linda Elrod, *Counsel for the Child: The Time Is Now*, 26 FAM. L.Q. 53 (1992) (emphasizing value of legal representation for children), with Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 200 (1998) (questioning whether lawyers for children have distorted substantive law and expressing concerns about unconstrained discretion of children's lawyers).

⁹Compare Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality*

the meaning of child representation, then the quality of representation surely suffers, and overall justice for the Nation's children is ultimately diminished.

Advocacy, 1 JOURNAL OF CENTER FOR CHILDREN AND THE COURTS 63 (1999)(describing variations in lay advocacy programs and emphasizing value of such advocacy in protecting children), with Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002)(contending that GAL's have too much discretion and are given too much deference by courts in determining children's best interests).

The disagreements and uncertainty surrounding expectations of children’s lawyers and lay representatives across the United States led the National Conference of Commissioners on Uniform State Laws (NCCUSL) to conclude that the area could benefit from a uniform law. A more immediate impetus was the ABA’s promulgation of Standards of Practice for Lawyers Representing Children in Custody Cases in 2003¹⁰ (ABA Custody Standards) and the perceived need for a uniform law to implement those standards. The Representation of Children in Abuse, Neglect, and Custody Proceedings Act Act marks NCCUSL’s entry into the ongoing national conversation about the proper role for children’s representatives. In this project, NCCUSL continues a strong tradition of reform efforts in the family law realm.¹¹

¹⁰ American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 129 (2003) (*ABA Custody Standards*).

¹¹ Some of the more notable successes from NCCUSL include the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1999 & Supp. 2003), and the Uniform Interstate Family Support Act, 9 U.L.A. pt. IB at 253 (1999). Other uniform acts in the family law realm that have not been widely adopted have still contributed to policy discussions across the United States. *See, e.g.*, UNIF. ADOPTION ACT, 9 U.L.A. 20 (1999).

In the summer of 2006, after three years of study, debate, drafting, and redrafting, the NCCUSL approved the new Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act.¹² The Act is NCCUSL's contribution to the policy choices in this field and reflects several fundamental premises: two alternative models of children's counsel are necessary to meet the needs of children and courts; every child in an abuse and neglect proceeding is entitled to legal representation; courts in private custody proceedings should have discretion to appoint a representative for a child when there is a particularized need; and lay advocates can be a valuable source of additional information to assist courts in determining a child's best interests. While disagreement among child advocates exists as to each of these premises, the drafters of the new Representation of Children Act sought to develop an approach that would best serve the practical and legal needs of children and the judicial system.

This Article explains the major policy debates underlying the Representation of Children Act and the rationales for the positions taken in the Act. Part I provides a brief background on the drafting history and scope of the new Act. Part II gives an overview of state law and summarizes the basic structure of the new Act and the intended operation of its major provisions. Part III explores more fully the important policy positions taken in the Act and the underlying rationales. In particular, Part III addresses the need for a best interests attorney as an option in any statutory scheme governing children's lawyers. In light of variations in children's capacities to direct

¹² Since neither the Act's full name nor its acronym (URCANCPA) has much audience appeal, I'll refer to it in the text as the Representation of Children Act, the Uniform Act, or simply the Act.

counsel, legislative preferences across the United States, and the articulated needs of the judiciary, the drafters of the Act concluded that the best interests attorney is a practical necessity.

If adopted nationwide, the Act will strengthen the law in a number of states by providing a clear statement of the responsibilities and powers of lawyers for children and the newly denominated “court-appointed advisor” and by mandating the appointment of counsel in abuse and neglect proceedings. The Act requires child-centered representation and imposes objective standards on best interests attorneys and court-appointed advisors in determining a child’s best interests. Moreover, the Act enhances the voice of the child by ensuring that his or her wishes will always be made known to the court if the child so desires, regardless of the nature of the appointed representative. The drafters believe that the changes represent a step forward in child representation by differentiating and more carefully defining the roles of persons appointed by juvenile courts and family courts to represent children and by identifying certain core duties that transcend category and context.

I. Background

In 2003, NCCUSL appointed a study committee to review the newly promulgated ABA Custody Standards¹³ and explore the idea of a uniform law in this area.¹⁴ The scope of the project was discussed at a meeting of the Joint Editorial Board for Uniform Family Law Acts in October 2003, and the consensus was that the project should start with a wide scope—including dependency

¹³ *ABA Custody Standards*, *supra* note 10.

¹⁴ At its meeting on August 5, 2003, the Executive Committee of NCCUSL approved a recommendation to form "a study committee to investigate the feasibility of a Representation of Children in Custody Disputes Act."

and neglect hearings—possibly to be narrowed as the project progressed. In early 2004, the study committee recommended that a drafting committee be approved to draft legislation implementing the ABA Custody Standards and to report back on whether the project should also include legislation implementing earlier standards proposed by the ABA in 1995 for the representation of children in abuse and neglect cases.¹⁵ The Executive Committee of NCCUSL ultimately approved a resolution that tracked the recommendations of the Study Committee, and the Conference appointed the Drafting Committee on the Role of Attorneys Representing Children in Custody Disputes.¹⁶

¹⁵ The recommendation was that "a drafting committee on the representation of children in cases affecting child custody be approved by the committee on scope and program to draft legislation to implement the Standards of Practice for Lawyers Representing Children in Custody Cases adopted by the American Bar Association on August 12, 2003, and to study and report back to Scope and Program as to whether the project should include legislation implementing the ABA Standards for Representation of Children in Abuse, Neglect, and Dependency Cases and representation of children in termination of parental rights cases."

¹⁶ The Drafting Committee was chaired by Rhoda Billings, whose exceptional leadership

skills helped navigate the Committee through some intense debates. The Committee itself included outstanding lawyers, judges, and academics who worked tirelessly during the marathon meetings. The project benefitted enormously from the expertise of the two ABA Advisors: Ann Haralambie, author of *THE CHILD’S ATTORNEY* (1993) and Howard Davidson, Director of the ABA Center for Children and the Law. Several observers, including Jeff Atkinson, Miriam Krinsky, Andrea Neimeyer, and Marvin Ventrell, faithfully attended many Drafting Committee meetings and contributed their valuable insights and knowledge to the project.

In light of the uncertainty surrounding the scope of the project, two preliminary issues facing the Drafting Committee were, first, whether to expand the project to include dependency and termination proceedings as well as private custody disputes, and, second, whether to address the role of the lay advocate, commonly called “guardian ad litem.” As to the first issue, the Drafting Committee recognized that there was a need for more clearly defined representative roles in abuse and neglect proceedings as well as private custody disputes. While the substantive issues, governing law, and litigation dynamics of the two settings are very different, the Committee concluded that the standards governing representation of children in both settings should be the same. In the Committee’s view, both private custody disputes and child protection proceedings would benefit from more definite guidelines that impose clear duties owed to the child client. Crafting a set of standards applicable only to the custody context might produce confusion for judges as well as child advocates. Moreover, the demarcation between the two categories of proceedings is somewhat artificial, and similar concerns can arise in both contexts. Custody cases involving allegations of abuse or neglect sometimes evolve into dependency proceedings. Conversely, in dependency cases where a court is considering two alternative placements for a child, the dependency court may evaluate the placements in much the same way as a family court would in a custody dispute. Thus, the Committee concluded that any attempt to develop uniform standards of practice for children’s representatives should include both types of court proceedings.¹⁷

¹⁷ From the outset, the Drafting Committee understood that the Act would not apply to the representation of children in juvenile delinquency proceedings. Delinquency proceedings are quasi-criminal in nature and implicate unique constitutional concerns, such as the right of confrontation, the right to testify in one’s defense, and the privilege against self-incrimination, not ordinarily associated with abuse and neglect and private custody proceedings. *See, e.g., State ex*

rel Q.U.O., 886 So.2d 1188 (La. App. 2004)(reviewing Fifth Amendment challenge to adjudication of delinquency); In re Matter of C.J.W.J., 699 N.W.2d 328 (Minn. App. 2005)(reviewing minor's claim of ineffective assistance of counsel under Sixth Amendment in adjudication of delinquency).

As to the question of the lay representatives, the Drafting Committee came to the conclusion that a proposed act on child representation should include guidelines for non-lawyer representatives in order to provide courts and child advocates with a set of integrated standards. Since most states have endorsed a hybrid lawyer-guardian ad litem model of child representation—a model the Committee ultimately rejected—the Committee felt that an Act that did not include standards for the non-lawyer representative would be inadequate. At the same time, the Committee recognized that many CASA programs and guardian ad litem programs around the nation have developed excellent standards of practice for local use. The Committee’s goal was to complement the valuable work already being done in that area by producing a law that would help clarify and distinguish the roles of lawyer and non-lawyer representatives. NCCUSL ultimately approved of the Committee’s request that it be permitted to develop an act encompassing representation of children, by lawyer and non-lawyer advocates, in both custody and abuse and neglect proceedings.¹⁸

¹⁸ The official approval from the Scope and Program Committee was given on January 14, 2005. The Committee expended considerable time and energy on the exact wording and punctuation of the Act’s name. *Compare* April 2004 Meeting Draft (Role of Attorney in Custody Disputes Act), available at www.nccusl.org, with 2005 Annual Meeting Draft (Representation of Children in Abuse and Neglect and Custody Proceedings Act), available at www.nccusl.org.

Over the three years of debate and deliberation, the Committee evolved in its approach to several of the challenging policy issues underlying the field of child representation. Patterned loosely after a newly enacted statutory scheme in Texas for representation of children¹⁹ that itself was based on the ABA Custody Standards, the original draft of the Act endorsed the hybrid attorney/guardian ad litem category.²⁰ The Committee fairly quickly abandoned that approach because of the inconsistency in roles and likelihood of ethical problems for attorneys under governing rules of professional conduct.²¹ Similarly, the role of best interests attorney, itself a controversial feature of the ABA Custody Standards,²² evolved within the Committee from that of a lawyer for a concept to a lawyer for the child, with the final Act requiring the best interests attorney to assume most of the basic responsibilities inherent in the attorney-client relationship.²³ On a related question, concerns were raised as to whether the Act, by spelling out the duties of

¹⁹ TEXAS FAMILY CODE Ch 107 (2003 Amendments)(authorizing appointments of attorney ad litem, amicus attorney, and attorney in dual role for children). *See generally* HON. DEBRA H. LEHRMANN, COURT-APPOINTED LEGAL REPRESENTATION OF CHILDREN IN TEXAS FAMILY LAW CASES §§ 3.10-12 (2004-05 Edition)

²⁰ *See* Section 2(4), April 2004 Meeting Draft, available at www.nccusl.org (defining “dual role” representative as attorney and guardian ad litem).

²¹ Section 14 of the Act makes clear that the lay “court-appointed advisor” is not to function as an attorney. *See* notes 85-90 *infra* and accompanying text.

²² *See* Standard V, ABA Custody Standards.

²³ The ABA Child Custody Standards describe the best interests lawyer as representing the child’s best interests rather than the child. *See* Standard V.F., *ABA Custody Standards, supra* note 10.. That approach was endorsed in early drafts of the Act. *See* Section 2(1), *April 2004 Meeting Draft*, available at www.nccusl.org. (defining best interests attorney as an attorney who provides legal services “necessary to assist the court in protecting the child’s best interests rather than to provide legal services to the child”).

lawyers, might encroach on the authority of state judiciaries to regulate the practice of law.²⁴ As a result, the sections directly prescribing attorney duties are now presented in two alternatives, giving states the option of adopting the substantive provisions by court rule rather than by legislative enactment.²⁵

²⁴ See Memo to Howard Swibel, President of NCCUSL, from Commissioner Battle Robinson, August 2, 2005, available at www.nccusl.org

²⁵ See Alternative B and Legislative Note to Sections 11, 12, and 13, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT (for states where duties of attorneys can be prescribed only by court rule or administrative guideline and not by legislative act).

The Act's mandate for the appointment of a lawyer for every child in an abuse or neglect proceeding was a point of prolonged debate, driven in part by a desire not to impose additional costs on those states that do not already require lawyers.²⁶ As a result, one interim draft contained a legislative escape clause,²⁷ but the Committee ultimately returned to an unequivocal mandate as set forth in Section 4.²⁸ On another question relating to appointment of lawyers, early drafts permitted the appointment of a best interests attorney as an additional lawyer for a child already represented by a child's attorney under certain circumstances.²⁹ When concerns arose that a dual attorney model might be confusing from a child's perspective and unpopular in state legislatures, the Drafting Committee first bracketed the option in an interim draft³⁰ and finally removed the option altogether in a later draft.³¹ Ironically, a slightly revised dual attorney option was then

²⁶ *See id.*

²⁷ An interim draft proposed a legislative note to give states the option of appointing a court-appointed advisor rather than a lawyer for a child in an abuse or neglect proceeding. *See* Legislative Note, Section 4, *February 2006 Meeting Draft*, available at www.nccusl.org. That proposal in turn triggered a strong letter of opposition from the President of the American Bar Association, who explained that ABA policy firmly supported the absolute mandate for appointment of lawyers in child protection proceedings and that he would anticipate "significant opposition in the ABA House of Delegates" if the Legislative Note were to remain in the Act. *See* Letter from ABA President Michael S. Greco to Hon. Rhoda B. Billings, January 31, 2006 (copy on file with author).

²⁸ *See* Section 4, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT ("In an abuse or neglect proceeding, the court shall appoint either a child's attorney or a best interests attorney.")

²⁹ *See* Section 402, October 2004 Meeting Draft, available at www.nccusl.org (permitting child's attorney to request appointment of best interests attorney where child persists in taking position that child's attorney believes will place child at risk of harm).

³⁰ *See* Section 12, October 2005 Meeting Draft, available at www.nccusl.org

³¹ *See* Section 12, February 2006 Meeting Draft, available at www.nccusl.org

reinserted into the Act as a result of a floor amendment at the 2006 Annual Meeting, on the rationale that the Act should provide courts with maximum flexibility in appointing representatives for children.³² Finally, on the contentious question of immunity for children's representatives, the Committee's perspective changed from an original grant of immunity for both a best interests attorney and a court-appointed advisor to a preference for immunity for only the court-appointed advisor.³³

Through a process of open discussion, deliberation, and compromise, the Committee came to closure on these questions and others. The successive drafts reveal a gradual strengthening of the Committee's determination to enhance the child's voice while also accommodating the needs of the judges who must preside over these difficult cases.

II. Key provisions of Representation of Children Act

³² Amendment proposed by Commissioner Joan Zeldon and adopted by majority vote, July 8, 2006, Transcripts of NCCUSL Annual Meeting. See Sections 9(c), 11(c)(Alternative A), 12(d), (e) (Alternative A), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

³³ Compare Section 18, *October 2004 Meeting Draft*, available at www.nccusl.org, with Section 18, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

When NCCUSL began its consideration of the question of children's representation, it had the benefit of a rich literature on the topic,³⁴ a diverse

³⁴ A cross-section of the literature includes JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001)(child's lawyer should develop child-centered relationship with child client over time and discern child's views by contextual understanding of child's world); ANN M HARALAMBIE, THE CHILD'S ATTORNEY (1993)(child's lawyer should advocate child's wishes except where wishes will place child at risk of harm but lawyer can minimize ethical problems by counseling child); Donald Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L. Q. 441 92000)(*Two Distinct Lawyer Roles*) children's evolving capacities require separate standards for client-directed attorney and best interests guardian ad litem); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996)(*Paradigm for Determining Role of Counsel*)(child's lawyer should

landscape of state laws offering a variety of approaches,³⁵ and an assortment of competing standards from professional groups.³⁶ This Part gives a brief overview of variations in the law of child representation around the country before exploring the structure and operation of the new Act.

focus on child's substantive legal rights rather than advocating child's wishes, since child's wishes mean little if substantive law does not afford legal right to child); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996)(lawyer can empower child client by greater advocacy of child's wishes); Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 Fordham L. Rev. 1699, 1699 (1996)(*You're My What?*)(children's developmental limitations impede their understanding of lawyer-client relationship); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-making Capacity*, 17 FAM L.Q. 287 (1983)(child's lawyer should advocate child's expressed wishes when child is "capable of making considered decision"). The proceedings of the UNLV Children's Conference generated a volume of scholarly and impassioned articles by experts in the field and will undoubtedly have an impact on the field. See Bruce A. Green & Annette R. Appell, *Representing Children in Families—Foreword*, 6 NEV. L.J. 571 (2006).

³⁵ See Appendix A, *supra* note 6.

³⁶ See *infra* notes 130-50 and accompanying text.

Although state laws vary widely in this area, some generalizations are possible. No state mandates across the board that lawyers for children must always function as traditional client-directed lawyers, but a few have prescribed that role for children over a certain age,³⁷ for children who have clearly expressed an objective that is different from the position taken by an assigned representative,³⁸ or for children who are capable of directing counsel.³⁹ In the abuse and neglect context, children's representatives are much more likely to be appointed as guardians ad litem, or lawyers functioning as guardians ad litem, than as client-directed attorneys.⁴⁰ The preference for a guardian ad litem model

³⁷ See, e.g., WEST'S IDAHO CODE ANN. §16-1614 (2005)(child aged 12 years or older may have attorney to function either as GAL or client-directed attorney within court's discretion); MINN. STAT. ANN. §260C.163 (2005)(in child protection proceeding child aged 10 or older entitled to counsel if court feels appointment is appropriate, and counsel shall not also act as child's guardian ad litem); WEST'S NEW MEX. STAT. ANN. § 32A-3B-8 (2005)(child aged 14 or older entitled to client-directed attorney); Wis. Stat. Ann. Children's Code §48.23 (2005)(child aged 12 years or older entitled to counsel in child protection proceeding before court may place child outside of home; court may appoint guardian ad litem instead of counsel for child younger than 12).

³⁸ See, e.g., MICHIGAN COMP. LAWS ANN. § 712A.17d(2) (West 2005)(permitting court to appoint additional attorney for child where lawyer-guardian ad litem's determination of child's best interests are inconsistent with child's view); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004)(if child's wishes differ from guardian ad litem's position in proceeding for termination of parental rights, court must appoint independent counsel to represent child).

³⁹ *Maryland Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings* (2001)(attorney is client directed if attorney determines child has "considered judgment"); *Massachusetts 2004 Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases* § 1.6 (attorney is client-directed if attorney determines child is capable of making "adequately considered decision").

⁴⁰ See Peters, *How Children Are Heard*, *supra* note 5, at Appendix C. US State-State Chart) Professors Peters' research reveals that a clear majority of states use the hybrid lawyer/guardian ad litem model. See also Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 424-26 (2000) (noting that at least

is due in part to the mandate of the federal Child Abuse Prevention and Treatment Act (CAPTA).⁴¹ As a condition of receiving federal funds for child abuse prevention and treatment programs, CAPTA requires states to appoint a guardian ad litem for every child who is the subject of an abuse or neglect proceeding. Although CAPTA expressly permits the guardian to be a lawyer, the statute requires that the guardian “make recommendations to the court concerning the best interests of the child,”⁴² a function ordinarily associated with non-lawyers.⁴³ As a result, many states routinely appoint lawyers as guardians ad litem without careful delineation of the distinctions between the two roles. The hybrid lawyer/guardian ad litem typically has the task of assisting the court in determining a resolution that will be in the child’s best interests and is not bound by the child’s wishes.⁴⁴ While many states expressly require the representative to

forty-one states mandate or permit appointment of guardian ad litem in abuse and neglect proceedings).

⁴¹ See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000), which requires states to have “provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”

⁴² *Id.*

⁴³ The UNLV Conference Recommendations include a proposal to amend CAPTA to explicitly provide for the appointment of client-directed lawyers for children in abuse and neglect proceedings. See *UNLV Recommendations*, *supra* note 1, at pt. V.A.2.

⁴⁴ See Appendix A, *supra* note 6.

report the child's wishes to the court,⁴⁵ others do not explicitly impose that duty.⁴⁶

On the other hand, some states have required the lawyer/guardian ad litem to function as a witness in court, a role that raises obvious ethical problems if the representative is also functioning as a lawyer.⁴⁷

⁴⁵ See, e.g., ME. REV. STAT. ANN, tit. 22, § 4005(1) (E) (West 2004) (guardian ad litem must make child's expressed wishes known to court); 42 PA.. CONSOL. STAT. ANN. § 6311(b) (9) (2004) (guardian ad litem must advise court of child's wishes; conflict between guardian's recommendation and child's wishes shall not be considered conflict of interest). See Federle, *Children's Rights*, *supra* note 40, at 427-28.

⁴⁶ See, e.g., R.I. GEN. LAWS § 40-11-14 (2004) (requiring court to appoint "a guardian ad litem and/or a court-appointed special advocate" without specifying duties). Professor Peters' research indicates that 17 jurisdictions do not expressly require the child's representative to advocate or present the child's wishes to the court. See Peters, *How Children Are Heard*, *supra* note 5, at 1014.

⁴⁷ For a case addressing these ethical tensions, see *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998)(modifying traditional ethical restrictions on attorney-client relationship to permit attorney/guardian ad litem to breach confidentiality in order to advocate client's best interests but

barring attorney/guardian ad litem from testifying as fact witness). *See generally* Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AMER. ACAD. MATRIM. LAW. 183, 199-205 (2005)(discussing case law that addresses ethical limitations on attorneys that conflict with guardian ad litem role).

In the context of child custody disputes, the statutory law of most states authorizes courts to appoint an attorney or a guardian ad litem for the child, but regardless of label, the representative's role typically is to assist the court in protecting the child's best interests rather than to advocate the child's wishes.⁴⁸ Arizona emerged recently as the first state to adopt the three categories of representatives encompassed in the new Child Representation Act,⁴⁹ and Maryland has also recently statutorily recognized the availability of a best interests lawyer in custody cases.⁵⁰ As in the abuse and neglect context, a few states have tried to address the potential conflict when the child's preferences conflict with the attorney's perception of the child's interests.⁵¹ Most states,

⁴⁸ See Appendix B, *supra* note 6.

⁴⁹ See Rule 10, ARIZONA RULES OF FAMILY LAW PROC., 17B ARIZ. REV. STAT. (Supp. 2006).

⁵⁰ See, e.g., ANN. CODE OF MD. §1-202 (in custody or support case, court may appoint lawyer to serve as "child advocate attorney" or "best interest attorney"; in either role, lawyer shall exercise ordinary care and diligence). .

⁵¹ See, e.g., MICH. COMP. LAWS ANN. 722.24(2), applying lawyer guardian ad litem model established for child welfare context, MICH. COMP. LAWS ANN. 712A.17d, discussed *supra* at note 38, to custody context.

however, have simply left the potential conflict for resolution by the representative on a case-by-case basis.

The ubiquitous term “guardian ad litem” in both child welfare and child custody cases across the United States can apply to a variety of functions.⁵² While courts often refer to the guardian ad litem as “the arm of the court,”⁵³ the guardian’s role may encompass acting as expert witness or mediator as well as investigator and court advisor.⁵⁴ In states where the duties of guardians ad litem are spelled out by statute or court rule, they may include investigation of the case, interviews with parties and others knowledgeable about the child, review of relevant records, participation in court proceedings and settlement discussions, and reporting of findings and recommendations to the court.⁵⁵

In the most recent compilation of data on state child representation laws that is publicly available, Professor Jean Koh Peters concluded that states laws

⁵² See Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998)(describing myriad functions of guardian ad litem and recommending that term be discarded altogether for more precise designations by role, such as investigator, mediator, or expert witness).

⁵³ See, e.g., *Clark v. Alexander*, 953 P.2d 145, 152 (Wyo. 1998) (stating that the traditional role of a guardian ad litem is to serve as an “arm of court”); *Collins v. Tabet*, 806 P.2d 40 (N.M. 1991) (holding that a guardian ad litem functioning as an “arm of the court” is entitled to absolute quasi-judicial immunity).

⁵⁴ See Raven C Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Legal system Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998).

⁵⁵ See, e.g., MINN. STAT. § 518.165 (2004) (enumerating a broad range of duties for guardians ad litem in custody cases); ARIZ. REV. STAT. § 8-522 (2003) (listing duties of “special advocates” in dependency actions).

continue to be “extremely varied, unclear and lacking uniformity, within and among jurisdictions.”⁵⁶ She added that in many states the laws governing child representation “contain inherent confusion for any lawyer playing the role of representative, and thus for any child represented in the jurisdiction.”⁵⁷ This lack of clarity and consensus about the roles of children’s representatives in formal law across the United States prompted NCCUSL to embark on the project that ultimately yielded the new Representation of Children Act.

⁵⁶ Peters, *How Children Are Heard*, *supra* note 5, at 1014.

⁵⁷ *Id.* at 1015.

The new Act governs appointments of representatives for children in abuse and neglect proceedings as well as custody proceedings. Under Section 2, “abuse or neglect proceeding” includes child protection proceedings as well as actions to terminate parental rights.⁵⁸ “Custody proceeding,” in contrast, is more broadly defined to include proceedings in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue.”⁵⁹ This would encompass a range of court proceedings in which custody is at issue, such as divorce, parentage determinations, adoptions, and cases brought to protect a child or parent from domestic violence.⁶⁰

⁵⁸ Section 2(1), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

⁵⁹ Section 2(5), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

⁶⁰ *See id.* Comment.

Drawing on the ABA Custody Standards, the Act provides for two categories of lawyers—the child’s attorney and the best interests attorney. The Act also endorses a lay representative denominated “court-appointed advisor,” but consistent with the ABA Custody Standards, the Act does not permit the hybrid category of attorney/guardian ad litem. The hybrid category, a popular form of child representation across the United States, has given rise to role confusion and ethical tensions where, for example, the same individual functions both as an attorney for the child and a witness in the proceeding.⁶¹ Like the ABA Custody Standards, the Act directs lawyers to remain within their professional role and bars them from functioning as witnesses. Conversely, the lay representative role, denominated a “court-appointed advisor” under the Act, is not to function as a lawyer even if the individual appointed possesses a license to practice law.⁶² For all three categories, the Act seeks to improve the overall competence and

⁶¹ See Rule 3.7, ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002)(generally prohibiting attorney from acting as advocate and witness in same proceeding). I have explored these ethical tensions elsewhere. See generally Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AMER. ACAD. MATRIM. LAW. 183 (2005)

⁶² See Section 2(4), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

professionalism of people who are appointed to represent child.⁶³ The Act requires that lawyers and court-appointed advisors be qualified by experience or training,⁶⁴ and the commentary encourages states to adopt state-wide standards of practice.

⁶³ In particular, individuals appointed under the Act should have knowledge not just of applicable substantive law and available treatment systems but of child development, the impact of abuse and violence, the role of culture in family dynamics, and other dimensions of childhood. *See id.*, Comment to Sections 7, 8.

⁶⁴ *Id.*, Sections 7, 8(a).

The child's attorney and the best interest attorney share numerous core functions as a legal representative for the child. Under Section 11, they both must get to know their child client in context⁶⁵ and perform a comprehensive factual investigation, including interviews with people having relevant information. Both categories of lawyer must advise and counsel the child in a developmentally appropriate way and keep the child informed of the status of the proceedings and the opportunity to participate.⁶⁶ Both categories of attorney should explain the meaning and consequences of the child's choices in terms the client can understand. Significantly, both categories of lawyer must inform the court of the child's expressed goals in the proceeding if the child so desires.⁶⁷ More generally, the attorney, whether a child's attorney or a best interests attorney, should participate actively in all hearings and conferences on issues within the scope of the appointment and review proposed stipulations affecting the child.⁶⁸ Both categories have

⁶⁵ Section 11(b)(1)(Alternative A) instructs both categories of lawyers to meet with the child and ascertain "in a manner appropriate to the child's developmental level, the child's needs, circumstances, and views." *Id.* The duty to get to know the child in context, a notion powerfully developed by Professor Jean Koh Peters, means that the lawyer must try to understand the child's perspectives and individualized circumstances in determining how to represent the child. *See* PETERS, REPRESENTING CHILDREN, *supra* note 34.

⁶⁶ *See* Section 11(b)(4), (5)(Alternative A). As noted in the Comment to Section 11, the child may benefit emotionally and psychologically by participating in a court proceeding affecting his or her future. A recent nationwide study concluded that in the abuse and neglect context, "[c]hildren, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties." The Pew Commission on Children in Foster Care, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 42 (2004), available at www.pewfostercare.org

⁶⁷ The child's attorney not only has the duty to inform the court but must advocate the child's position. *See id.*, Section 12. The best interests attorney, on the other hand, has the duty to present the child's expressed objectives to the court if the child so desires but not necessarily to advocate those objectives. *See id.*, Section 13(c).

broad access to evidence relating to the child⁶⁹ and receive full protection for their work product.⁷⁰

Thus, the child's attorney and best interests attorney have much in common and will often be performing identical services for the child client.

⁶⁸ *See* Section 11 and Comment, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

⁶⁹ *See id.*, Section 15.

⁷⁰ *See id.*, Section 17.

While the categories do share many of the same responsibilities, they differ in certain key respects. The child's attorney is in a client-directed relationship with the child and is bound by traditional ethical obligations governing that relationship. This category of representative is appropriate for those children capable of directing a lawyer and would be inappropriate for children lacking that capacity.⁷¹ Under Section 12, the lawyer has a general duty to advocate the child's objectives unless they are prohibited by law or lacking in factual foundation.⁷² If the child cannot or will not direct the lawyer on a particular issue, Section 12 permits the lawyer to pursue a position that is in the child's best interests so long as it will not conflict with the child's

⁷¹ Consistent with Rule 1.14 of the ABA Model Rules, the child's attorney should determine whether the child has sufficient maturity to understand and form an attorney-client relationship. As the Comment to Section 12 makes clear, a child's capacities are fluid and incremental, and a child might be capable of directing a lawyer as to major questions in the litigation but incapable of providing guidance on minor issues.

⁷² Section 12(c) (Alternative A), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

expressed objectives.⁷³ In this respect, the child’s attorney may act similarly to the attorney for an adult client, since lawyers frequently take positions in litigation that are consistent with the client’s over all goals without receiving express direction from the adult client. Alternatively, Section 12 would allow the child’s attorney to take no position on the matter in question or to seek the appointment of a best interests attorney or a court-appointed advisor.⁷⁴

⁷³ *Id.*, Section 12(d)(1)(Alternative A). In this respect, the Act diverges from the language of the ABA Custody Standards, which permit the lawyer in this situation to advocate a position that will serve the child’s “legal interests,” defined as “interests of the child that are specifically recognized in law and that can be protected through the courts.” ABA Custody Standards IV.C.2. Commentary. Because the distinction between “legal interests” and “best interests” seemed unclear to the Drafting Committee, the terminology of “best interests” was used

⁷⁴ Section 12(d)(2), (3)(Alternative A), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

Section 12 also addresses the dilemma that a child’s attorney may face when the child persists in taking a position that the attorney believes will endanger the child. Through effective counseling, most such impasses can be avoided, but where, despite appropriate counseling, the child maintains his or her position and the attorney believes that the child is “at risk of substantial harm,” the Act permits the attorney to take protective action.⁷⁵ The attorney may request the appointment of a court appointed advisor or a best interests attorney, without revealing the reasons for the request.⁷⁶ Thus, ordinary rules of confidentiality govern the relationship between the child

⁷⁵ *Id.*, Section 12(e)(Alternative A). The protective actions provided under Section 12 are intended to comply with the general language of Model Rule 1.14, ABA Model Rules of Professional Conduct. Model Rule 1.14 provides, “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including . . . seeking the appointment of a guardian ad litem”

⁷⁶ *Id.*, Section 12(e)(Alternative A). When the child’s attorney requests the appointment of a best interests attorney, the child’s attorney may either stay in the case or withdraw. Although representation by two attorneys serving in different capacities is not common, the possibility of such dual representation is recognized in the ABA Custody Standards and in the law of a few states. *See* Standard IV.C.3, *ABA Custody Standards*, *supra* note 10 (where child’s objectives place child at risk of substantial harm, child’s attorney may request appointment of best interests attorney and

and the child's attorney.

continue to represent child's expressed position).

The best interests attorney, in contrast, must advocate a position that will serve the child's best interests "based on the facts relevant to the proceeding and according to criteria established by law related to the purposes of the proceeding,"⁷⁷ but the attorney is not bound by the child's expressed objectives. This category of lawyer is necessary to provide legal representation to the child who is incapable of directing counsel. For infants and very young children, and for the traumatized older child, the best interests attorney provides a needed model for legal advocacy. The best interests attorney, already under a duty to get to know the child in context and to fully investigate the facts, must determine the child's best interests according to objective legal criteria, not the subjective opinions or biases of the attorney.⁷⁸ The governing legal standards, in other words, are the guideposts, applied to the client's individualized circumstances.⁷⁹ Moreover, in deciding what to advocate, the best interests attorney must consider the child's objectives and give

⁷⁷ *Id.* Section 13(a).

⁷⁸ As explained in the commentary, the best interests attorney must follow objective criteria and not substitute his or her personal values. "The 'criteria established by law relating to the purposes of the proceeding' will include standards imposed by federal and state law for child protection in abuse and neglect proceedings, as well as a state's substantive law governing child custody determinations or other issues relevant to the proceeding." *Id.* Section 13, Comment.

⁷⁹ *Id.*, Section 13, Comment.

them due weight according to the underlying reasons and the child's developmental level.⁸⁰

Although the best interest attorney's assessment of the child's interests may often coincide with the child's wishes, sometimes they may diverge. The Act attempts to avoid the problem of unconstrained discretion by directing the best interests attorney to follow applicable legal standards, to apply the governing law to the child's individualized circumstances, and to take into account the child's expressed objectives.

⁸⁰ *Id.*, Section 13(d)(Alternative A).

The best interests attorney, like the child's attorney, may not reveal client confidences unless otherwise permitted by the rules of professional conduct.⁸¹ Nevertheless, a difference does exist with respect to the attorney's possible use of confidential information without the client's consent. The best interests attorney may use, but not disclose, confidential communications received from the child if necessary to perform the duties inherent in the role.⁸² The distinction between use and disclosure—a distinction that the attorney need to explain to the child—permits the attorney to use the child's communication in developing the case without revealing that the child was the source of the information. If a child, for example, were to tell her lawyer that a parent had been intoxicated while caring for the child, the lawyer might use that communication to investigate whether the parent habitually abuses alcohol. If corroborating evidence of alcohol abuse were discovered, the best interests attorney might determine that advocating for court-ordered treatment for the parent would serve the child's interests. In that event, the attorney might bring the evidence of alcohol abuse to the attention of the court without revealing that the child was the original source of information. This inroad on the traditional attorney-client relationship is consistent with the ABA Custody Standards⁸³ and the Model Rules of Professional Conduct, if interpreted

⁸¹ *Id.*, Section 13(e)

⁸² *Id.*, Section 13(e)(Alternative A).

⁸³ Standard V.B, *ABA Custody Standards*, *supra* note 10.

flexibly.⁸⁴

⁸⁴ Model Rule 1.14 provides that “[w]hen taking protective action [for a client with diminished capacity], the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonable necessary to protect the client’s interests.”

The third category of representative under the Act is the “court-appointed advisor,” an individual appointed to assist the court in determining the best interests of the child.⁸⁵ The definition of the court-appointed advisor is sufficiently flexible to include volunteer advocates such as persons affiliated with Court Appointed Special Advocate (CASA) programs.⁸⁶ The duties of the court-appointed advisor include certain functions associated with guardians ad litem, but the Act avoids the “guardian ad litem” terminology in order to avoid the widespread disagreement and confusion about the meaning of that term. Under Section 14, the court-appointed advisor must meet with the child, determine the child’s needs, circumstances, and views, and conduct a full investigation.⁸⁷ Just as both categories of attorney must present the child’s expressed objectives to the court, the court-appointed advisor must also do so and must consider the child’s goals in deciding what recommendations to make in the proceeding.⁸⁸ Section 16, governing participation in the proceedings, reiterates that the court-appointed advisor may not function as an attorney. That limitation is integral to the Act’s goal of eliminating the hybrid attorney/guardian ad litem mode. Section 16 also bans ex parte contact with the court by any representative and requires that a court-appointed advisor be subject to cross-examination if he or

⁸⁵ Section 2(4), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

⁸⁶ The CASA is a lay volunteer who advocates as a non-lawyer on behalf of a child in child protection proceedings. All CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. See www.nationalcasa.org One of the key strengths of the CASA program is the assignment of only one child to one CASA at a time, producing highly individualized and child-focused representation.

⁸⁷ *Id.*, Section 14(1).

⁸⁸ *Id.*, Section 14(3), (4).

she submits recommendations to the court.⁸⁹ The ban on ex parte contact and the requirement that the advisor be available for cross examination should avoid the due process problems identified by courts in the past.⁹⁰

⁸⁹ *Id.*, Section 16(e)

⁹⁰ *See, e.g.*, In re Marriage of Bates, 819 N.E.2d 714 (Ill. 2004)(failure to provide copy of guardian ad litem report to mother in custody proceeding was violation of mother's due process rights).

Because of the fundamental importance of the child's interests at stake in any abuse or neglect proceeding, Section 4 of the Act requires the appointment of either a child's attorney or a best interests attorney for every child who is the subject of such a proceeding.⁹¹ Children have profound liberty interests in their own safety, health, and well-being as well as interests in maintaining the integrity of the family unit and a relationship with their birth families. An erroneous decision to place a child in foster care or to terminate parental rights will unnecessarily disrupt the child's family relationships, while an erroneous decision not to remove a child may subject the child to the risk of abuse or extended impermanency. Court decrees can effectively redefine a child's identity and permanently shape a child's future. With such profound interests riding in the balance, the Drafting Committee determined that legal representation was essential. Only attorneys can effectively identify and analyze legal issues affecting their child clients and only attorneys can employ the full range of legal skills to ensure protection of their clients' procedural and substantive interests throughout the pendency of the case. Although one prominent scholar has warned that well-meaning but misguided children's lawyers may do more harm than good,⁹² the solution would seem to lie in better training and guidance for the individuals who undertake this important role, not the denial of legal counsel altogether.⁹³ Indeed, the great potential impact of the child welfare system on a child's life and the system's need for effective

⁹¹ Section 4, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

⁹² Martin Guggenheim, *How Children's Lawyer's Serve State Interests*, *supra* note 7. Professor Guggenheim more broadly questions the results of children's rights advocacy in his book, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005).

⁹³ See Howard Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69 (2006).

investigation and legal advocacy has led at least one court to conclude that children in child protection proceedings have a constitutional due process right to counsel.⁹⁴ Moreover, due to the importance of the children's interests at stake in child protective proceedings and the effectiveness of lawyers in helping courts avoid error, the ABA and prominent child advocacy groups have long supported a requirement for the appointment of counsel.⁹⁵

The drafters of the new Act recognized that the conditional spending requirement in CAPTA⁹⁶ for the appointment of a guardian ad litem for every child who is the subject of an abuse or neglect proceeding might be interpreted differently across the United States. While some states may view a child's attorney as satisfying CAPTA, others may read CAPTA to require a best interests advocate in all such cases. For that reason, Section 5 presents two alternatives. The appointment of a best interests attorney presumably would satisfy CAPTA in light of the best

⁹⁴ In *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 1353 (N.D. Ga. 2005), a federal district court interpreted the due process clause of Georgia's constitution to require appointed counsel for foster children in abuse and neglect proceedings and proceedings to terminate parental rights. In light of the strength of the child's interests and the serious risk of error, the court concluded that "only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." *Id.* at 1361. According to the court, "[j]udges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances. . . . CASAs are also volunteers who do not provide legal representation to a child." *Id.* In a consent decree reached after the decision, the parties agreed that the child's attorney, while representing the child's best interests, has a duty to present the child's views to the court. See Consent Decree in *A. et al. v. Barnes*, October 27, 2005 (1:02-CV-01686)(Judge Marvin H. Shoob).

⁹⁵ Preface, American Bar Association, *Proposed Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 375 (1995) (ABA Abuse and Neglect Standards) ("All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court's jurisdiction continues."); *ABA Juvenile Justice Standards Relating to Counsel for Private Parties* (1979).

⁹⁶ See *supra* notes 42-43 and accompanying text.

interests attorney's role as defined in Section 13. While a child's attorney might also satisfy CAPTA,⁹⁷ many states may interpret federal law to require a best interests representative. For that reason, Alternative A of Section 5 requires a court-appointed advisor unless the court has already appointed a best interests attorney. Alternative B, on the other hand, leaves the appointment of a court-appointed advisor up to the discretion of the court, regardless of which category of lawyer is appointed for the child.

⁹⁷ For a flexible reading of the CAPTA guardian ad litem requirement sufficient to encompass a client directed lawyer, see *In re Charles T.*, 102 Cal. App. 4th 869, 125 Cal. Rptr.2d 868 (Cal. App. 3d Dist. 2002).

The appointment of representatives for children in custody proceedings, in contrast, is discretionary under the Act. Under Section 6, courts should consult a variety of factors in determining whether a representative would be beneficial.⁹⁸ If a court anticipates that the evidentiary presentation by the parties will be incomplete, distorted, or otherwise inadequate, the appointment of a representative for the child can be particularly helpful. Moreover, one of the key values of a child's representative is to advocate for evidentiary procedures and methods of dispute resolution that are the least harmful to the child. While factors listed in Section 6 may raise special concerns warranting an appointment, court must also recognize that the appointment of a lawyer for a child or court-appointed advisor in a custody case may be unnecessary and might introduce a potentially intrusive and expensive additional voice in the proceeding.⁹⁹

⁹⁸ The factors listed in Section 6(b) draw heavily from a similar set of discretionary factors included in the ABA Custody Standards. *See* Standard VI, *ABA Custody Standards*, *supra* note 10.

⁹⁹ *See* AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.13 comment (b) (2002) [hereinafter *ALI PRINCIPLES*] (suggesting that appointment of advocate for child may constitute undesirable and inappropriate intrusion on parental authority and heighten adversarial nature of proceeding without enhancing court's ability to discern child's best interests).

Under the Act, the court determines the role of the attorney at the time of the appointment,¹⁰⁰ based on information then available to it concerning the child and the child's circumstances.¹⁰¹ Because of the exigencies of abuse and neglect proceedings, courts often must act quickly in appointing attorneys for children since the Act requires an appointment "before the first court hearing that may substantially affect the interests of the child."¹⁰² For practical purposes, judges who lack detailed information about a child's circumstances may need to use the child's age as a rough measure for purposes of the initial designation of an attorney role. At the same time, the Act recognizes that a child's capacity to direct counsel is "contextual and incremental and is not simply a function of chronological age."¹⁰³ Under Section 9, a court may revise the designation in light of new information or changed circumstances. Thus, if a best interests attorney determines that the child is capable of directing counsel and conveys that information to the court, Section 9 permits the court to redesignate the best interests attorney as a child's attorney where appropriate.¹⁰⁴ By giving the court the power to designate the category of representative, the Act seeks to ensure that appointees will understand the nature of their role from

¹⁰⁰ Section 9, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

¹⁰¹ *Id.*, Sections 4(b), 6(c).

¹⁰² *Id.*, Section 4(a).

¹⁰³ *See id.*, Section 4 Comment. For a thoughtful early framework for determining children's competency to direct counsel, *see Ramsey, supra note 34*, at 316 (recommending representation of a child's expressed wishes when the child is "capable of making a considered decision").

¹⁰⁴ Because of the differences in duties of confidentiality between child's attorney and best interests attorney, the Act does not permit a redesignation of a child's attorney as a best interests attorney. *See* Section 9, Comment. If a child's attorney determined that the child was not capable of directing counsel, the solution would be for the court to discharge the child's attorney and appoint a best interests attorney.

the time of the initial appointment forward.

The Act also addresses the issue of malpractice liability of the various representatives for children. Section 18 makes clear that only the child has a right of action¹⁰⁵ and provides a qualified immunity for court-appointed advisors.¹⁰⁶ The grant of immunity shields the court-appointed advisor, as an assistant to the court, from liability for actions and recommendations in the course of the appointment unless the advisor is guilty of willful misconduct or gross negligence.¹⁰⁷ This qualified immunity protects the advisors from civil damages actions so that they can fully investigate and formulate recommendations without fear of retaliation, thus meeting the courts' needs.

While most states extend immunity to persons serving in a guardian ad litem capacity,¹⁰⁸ the question of immunity for attorneys appointed under the Act is more contentious. Because the child's attorney functions as a traditional attorney whose loyalty is to the client, Section 18 does not extend immunity to that appointee and instead holds the attorney to ordinary standards of care.¹⁰⁹ The best interests attorney in some ways combines the functions of a child's attorney and

¹⁰⁵ See *id.*, Section 18(a). Although courts have recognized that the representative owes a duty of professional competence to the child and not to the other parties in the litigation, embittered parents still press such claims. See *In the Interest of Z.J.*, 153 S.W.3d 535 (Tex. App. 2004)(mother lacked standing to challenge performance of child's appointed attorney ad litem in parental rights termination proceeding).

¹⁰⁶ See Section 18(b), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

¹⁰⁷ *Id.*

¹⁰⁸ See *Carrubba v. Moskowitz*, 877 A.2d 773 (Conn. 2005)(surveying law of state law and recognizing absolute immunity for child's attorney whose primary duty was to protect child's best interests).

¹⁰⁹ See Section 18(b), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

of a court-appointed advisor. While the best interests attorney may advocate a position that is contrary to the child's expressed objective, the attorney must perform many aspects of traditional legal representation for the child. These include communicating the child's wishes to the court and representing the child's legal rights in the litigation. In light of the attorney-client relationship that does exist between the best interests attorney and the child, this section likewise holds that attorney to ordinary professional standards of care. Thus, the two categories of lawyers that can be appointed for a child are treated similarly for purposes of immunity.¹¹⁰

¹¹⁰ At least one recent state court decision held that an attorney appointed to represent a child's interests in a divorce action was not entitled to immunity from tort liability. *See Fox v. Wills*, 890 A.2d 726 (Md. 2006).

The best interests attorney, on the other hand, while in many respects performing duties of traditional legal representation, is in a non-traditional role vis a vis the child. Some states have extended immunity to such attorneys since they provide a service to the court by advocating the child's best interests.¹¹¹ Without such immunity, attorneys may be unwilling to accept appointments, particularly in the context of acrimonious divorces. The American Bar Association, moreover, has recommended qualified immunity for best interests attorneys.¹¹² For these reasons, Section 18 brackets "best interests attorney" in subsection (b) to permit states to choose to provide qualified immunity to that category of representative in addition to the court-appointed advisor.¹¹³

¹¹¹ See, e.g., *Blunt v. O'Connor*, 737 N.Y.S. 2d 471, 291 A.D.2d 106 (App. Div. 2002).

¹¹² See Standard VI. F, *ABA Custody Standards*, *supra* note 10.

¹¹³ See Section 18(b), UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

Finally, the Act requires that attorneys and court-appointed advisors receive adequate and timely compensation in abuse and neglect proceedings throughout the terms of the appointment, unless the person appointed is a volunteer advocate.¹¹⁴ The fees should come from public funds, and states are encouraged to ensure that adequate funds are appropriated and made available for this purpose.¹¹⁵ In custody cases, in contrast, compensation typically comes from the parties themselves. The Act permits the court to allocate fees between the parties and to impose various requirements to ensure timely and reasonable compensation for children’s representatives.¹¹⁶

IV. Two Models of Lawyers for Children

¹¹⁴ *Id.*, Section 19(a).

¹¹⁵ The Act does provide for reasonable reimbursement to the state by the parties where appropriate. *Id.*, Section 19(c).

¹¹⁶ *Id.*, Section 20.

While many people were pleased that NCCUSL would devote its resources to the important topic of children’s representation, the approach taken in the Act has already engendered controversy among child advocates. In particular, critics have argued that the Act’s endorsement of a “best interests attorney” alternative for children’s counsel is a step backwards in the field of children’s advocacy.¹¹⁷ NCCUSL itself, much like a legislative body, is a conference of generalists, not specialists, and one of the concerns underlying every uniform act is the question of “enactability.” A proposed set of standards for children’s representatives that did not include a best interests role for lawyers as an option would have been unlikely to garner the support of state legislatures or of NCCUSL itself. In the legislative halls, a cry of children’s rights surely resonates more as the right to be free from harm rather than the right to direct counsel. A notorious child abuse case in a state may very well result in policy changes aimed at achieving greater protection of children, but there are few cases, if any, that might motivate a legislature to provide greater autonomy to child clients.¹¹⁸ The forces that shape public opinion and legislative policy would seem to require the availability of a best interests model for children’s lawyers.

A curious disjuncture exists between the law governing children’s representatives around the country, on the one hand, and the arguments of child

¹¹⁷ Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 Nev. L. R. 1385 (2006).

¹¹⁸ See Randi Mandelbaum, *Are Abused and Neglected Children in New Jersey Faring Any Better Since the Tragedies of 2003*, Oct. N.J. LAW. 9 (2005)(analyzing legislative response to publicized cases of child abuse in New Jersey, including greater investigative resources). If a child complaining of abuse were disbelieved by an appointed representative, then legislators might support the adoption of a standard to compel lawyers and guardians to report the child’s wishes to the court but would be unlikely to result in a push for client-directed lawyering. .

advocates about the ideal role for children’s lawyers, on the other. In contrast to the models of representation that one sees in the statutes and case law, many children’s rights advocates today endorse a traditional client-directed model for children capable of directing counsel. The recommendations that emerged from the 1995 Fordham Conference as well as the 2006 UNLV Conference oppose the concept of best interests lawyering.¹¹⁹ This consensus, although not a unanimous view,¹²⁰ seems to be driven as much by a deep suspicion of subjective decision-making by lawyers¹²¹ as by the desire to empower children.¹²² As Professor Guggenheim, a leading critic of best interests lawyering, put it, “[A] growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.”¹²³ The literature

¹¹⁹ *Fordham Recommendations*, *supra* note 1, at 1301 (lawyer for child capable of directing representation must allow child to set goals of representation); *UNLV Recommendations*, *supra* note 1, at 609 (children’s attorneys should take direction from client and should not substitute for child’s wishes attorney’s own judgment of what is best for children or for that child).

¹²⁰ See Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) (arguing that client directed model and best interests model are both needed to accommodate developing capacities of childhood, and recommending bright-line age demarcation); Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian ad Litem Model*, 6 NEV. L.J. 1284 (2006) (arguing that hybrid model gives attorney needed discretion to tailor representation to individual needs of child client).

¹²¹ Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996).

¹²² JEAN KOH PETERS, *supra* note 34; Federle, *supra* note 34.

¹²³ Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody*,

evinces a significant distrust of any model of lawyering that authorizes the lawyer to make decisions for the child based on the lawyer's independent assessment of the child's welfare.¹²⁴

visitation and Child Protection Proceedings, 29 Loy. U. Chi. L.J. 299, 301 (1998).

¹²⁴ As Professor Guggenheim, explains, skepticism about best interests lawyering stems from multiple goals: to avoid decision-making based on personal bias, to foster predictability, to confine lawyers to their professional roles, and to ensure that the policies of the substantive law are carried out. *Id.*, at 312-13.

Although child advocates have been recommending stronger client-directed roles for lawyers for more than two decades,¹²⁵ most state legislatures have not moved consistently in that direction. Recent legislative changes in various states have endorsed both a best interests model of child representation¹²⁶ as well as a client-directed model.¹²⁷ Moreover, CAPTA continues to require the appointment of a “guardian ad litem” in abuse and neglect proceedings whose statutory duties include making recommendations to the court “concerning the best interests of the child.”¹²⁸ While the widespread preference for a best interest model may be, in part, an accommodation of that current federal mandate, the judiciary itself may favor an independent best interests advocate in child welfare and custody cases.¹²⁹ Realistically, then, the new

¹²⁵ *Fordham Recommendations*, *supra* note 1; Martin Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. REV. 76 (1984); Ramsey, *supra* note 34.

¹²⁶ *See, e.g.*, ARIZONA RULES OF PROCEDURE FOR FAMILY COURT, Rule 10 (effective Jan. 1, 2006); WEST’S ANN. CODE OF MD. § 1-202 (2006); MICH. COMP. L. ANN. 712A.17d (2004).

¹²⁷ *Massachusetts 2004 Performance Standards*, *supra* note 39.

¹²⁸ *See supra* notes 41-43 and accompanying text.

Representation of Children Act has a better chance of improving child representation nationwide by endorsing a best interests model as well as a traditional attorney model, rather than the traditional attorney model alone, and then providing clearer guidelines for both categories of lawyers.

¹²⁹ Judge Debra Lehrmann, for example, asks, “Does the child’s interest in directing the actions of counsel outweigh the child’s interest in being assured that all evidence bearing on his or her welfare is presented to the court?” Hon. Debra H. Lehrmann, *Who Are We Protecting?* 63 TEX. B.J. 122, 126 (2000).

The standards of child representation that have emerged from professional groups reflect some of the key debates in this area. The American Academy of Matrimonial Lawyers (AAML), the ABA, the National Association of Counsel for Children (NACC), and the American Law Institute (ALI), among others, have all recommended guidelines for children's representation.¹³⁰ The impetus for each set of standards was the common recognition that the lack of clear guidance for children's representatives ultimately hurts children, but the approaches taken in the various models contrast sharply. Of the various standards, the AAML takes the strongest stance favoring client-directed lawyering. The AAML would strictly limit the functions of lawyers for children who are too young to direct counsel.¹³¹ The role of a lawyer under the AAML guidelines largely depends on

¹³⁰ American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM ACAD. MATRIM. LAW. 1 (1995) (AAML Custody Standards) (recommending client-directed representation for "unimpaired" children, presumptively those children aged 12 or older, and limited non-advocacy role for lawyers representing "impaired" children); *ABA Abuse and Neglect Standards*, *supra* note 95 (recommending client-directed representation for child capable of directing counsel and representation of child's "legal interests" for child lacking that capacity); National Association of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1996) [hereinafter *NACC Revised Standards*] (recommending client-directed representation but permitting representation of child's interests when child cannot meaningfully formulate position); ALI PRINCIPLES §2.13, *supra* note 99 (proposing client-directed representation for child competent to direct terms of representation and appointment of guardian ad litem for child lacking competence); *ABA Custody Standards*, *supra* note 10 (proposing two models of representation, child's attorney and best interests attorney) .

¹³¹ See *AAML Custody Standards*, *supra* note 130. The standards were the result of a deliberative process within the AAML, but they also show the thoughtful influence of the reporter, Professor Martin Guggenheim. See

whether the child is “impaired” or “unimpaired,” and the guidelines recommend the use of a presumptive age demarcation.¹³² The role of a lawyer for an “unimpaired” child closely parallels the role of a lawyer for an unimpaired adult client¹³³—the lawyer must zealously pursue his client’s objectives and otherwise maintain an ordinary lawyer-client relationship.¹³⁴ The lawyer for the impaired child, in contrast, should not advocate a position on the outcome of the proceeding or on contested issues but should merely develop facts for the decision-maker to consider.¹³⁵ In the AAML’s view, “[t]he most serious threat to the rule of law

Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. REV. 76 (1984) (suggesting that children over age of seven should be deemed responsible for directing their attorneys and that younger children should be deemed incapable). Professor Guggenheim later revised his thinking to link the role of the child’s lawyer more closely to the particular legal context involved, focusing on the substantive rights afforded to the child in various areas of the law. *See Guggenheim, Paradigm for Determining Role of Counsel*, *supra* note 34. Most recently, Professor Guggenheim has suggested that children’s lawyers in child welfare cases may do more harm than good. *See Guggenheim, How Children’s Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

¹³² The standards provide that children aged twelve or older are presumptively unimpaired—that is, capable of directing a lawyer—and children younger than twelve are presumptive impaired. AAML Standard 2.2. The use of the “impaired/unimpaired” distinction derived from the language of Rule 1.14 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002) (providing guidelines for lawyers who represent clients with diminished capacity).

¹³³ *Id.* at Standard 2.3. The only variation in role that is linked to the client’s status as a child is the requirement that counsel try to expedite the proceedings and encourage settlement to protect the child from the harm that is caused by the litigation itself. *See* Standard 2.6.

¹³⁴ *Id.* at Standard 2.4 (lawyer should counsel child but lawyer must seek to attain child’s objectives, even if unwise).

¹³⁵ *Id.* at Standard 2.12.

posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests." ¹³⁶

¹³⁶ *Id.* at Standard 2.7, Comment.

To varying degrees, the recommended standards from other professional groups permit children’s lawyers under certain circumstances to diverge from a child client’s wishes or to engage in substituted judgment to arrive at a position the child has not formulated. The ABA Abuse and Neglect Standards, for example, reject the notion of a presumptive demarcation to determine capacity, instead taking the position that a child’s disability is “contextual, incremental, and may be intermittent.”¹³⁷ The Abuse and Neglect Standards allow a lawyer to advocate a child’s “legal interests” if the child cannot or does not express a position as to a particular issue.¹³⁸ Moreover, the ABA Abuse and Neglect Standards accept, albeit reluctantly, the attorney/guardian ad litem model. A lawyer appointed as guardian ad litem is “appointed to protect the child’s interests without being bound by the child’s expressed preferences.”¹³⁹ Thus, the ABA Standards envision a role for legal counsel even for the pre-verbal child. The commentary reveals a concern, similar to that of the AAML, about the risk of

¹³⁷ Standard B-3, Comment, *ABA Abuse and Neglect Standards*, *supra* note 95.

¹³⁸ Standard B-4(1), (2), *ABA Abuse and Neglect Standards*, *supra* note 95. “Legal interests,” in turn, are to be determined with reference to “objective criteria” established by law, based on the child’s needs and interests and not merely the lawyer’s personal values and experiences. *Id.* at Standard B-5 and Comment.

¹³⁹ *Id.* at Standard A-2. At the same time, the ABA Standards recognize the problematic nature of the dual role and express a clear preference for appointments of a child’s attorney. Under the Standards, if there is a conflict in the role of guardian ad litem and child’s attorney—such as where the child’s expressed wishes differ from what the lawyer believes to be in the child’s best interests—the lawyer is directed to continue to perform as the child’s attorney and withdraw as guardian ad litem. *Id.* at Standard B-2(1).

lawyers' acting on personal bias, but the ABA's approach is to constrain lawyers by limiting their advocacy role, not by eliminating that role altogether.

Similarly, the NACC, while committed to client-directed representation for children, has expressed reservations as to the duty on the child's lawyer to advocate the child's wishes throughout the litigation. Drawing on the work of Professor Peters and the Fordham Conference,¹⁴⁰ the NACC tried to achieve an appropriate blend of the values of autonomy and beneficence. As NACC Executive Director Marvin Ventrell explained, the NACC aimed for a "delicate representation balance between zealous attorney advocacy and child protection"¹⁴¹ by emphasizing the counseling function of the child's lawyer.¹⁴² Under the NACC Revised Standards, the child's attorney does not owe "robotic allegiance" to each directive of the child. Instead, the child's lawyer may exercise a degree of substituted judgment to present a position that will serve the child's interests when the child cannot meaningfully participate in the formulation of the client's position.¹⁴³ Fully aware of the problems of unconstrained bias and

¹⁴⁰ See *Fordham Recommendations, supra note 1* (recommending that attorney must follow child's expressed preferences and attempt to discern child's wishes in context in developmentally appropriate ways if child is incapable of expressing viewpoint); JEAN KOH PETERS, REPRESENTATION OF CHILDREN, *supra* note 34.

¹⁴¹ Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children's Law Manual Series (1999).

¹⁴² *Id.* at Standard B-4.

¹⁴³ *Id.* at Standard B-4 (2).

subjectivity, the NACC Revised Standards require the child's lawyer to adhere to objective criteria in the determination of the child's interests.¹⁴⁴

The new Representation of Children Act is most closely aligned with the position taken by the ABA in its 2003 Custody Standards.¹⁴⁵ Those Standards were the direct impetus for the new Uniform Act and are the genesis of the "child's attorney/best interests attorney" terminology.¹⁴⁶ Under the ABA Standards, the best interests attorney "provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives."¹⁴⁷ Significantly, the Uniform Act has shaded that definition to create a more robust attorney-client relationship between the best interests attorney and the child,¹⁴⁸ but in many other respects, including the

¹⁴⁴ The criteria include a full investigation of the child's circumstances, an individualized assessment of the child at the moment of the determination, consideration of the child welfare paradigms of psychological parent and family network, and the use of experts. *See id.* These criteria were drawn from Jean Koh Peters, *The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996).

¹⁴⁵ American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 *FAM. L.Q.* 129 (2003) [hereinafter *ABA Custody Standards*].

¹⁴⁶ *See ABA Custody Standards, supra* note 10. The evolution of the Standards is described by Reporter Linda Elrod, in *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 *FAM. L.Q.* 105, 107-14 (2003).

¹⁴⁷ *Id.* at Standard II(B).

¹⁴⁸ *See supra* notes 65-70, 77-84 and accompanying text.

rejection of the hybrid attorney/guardian ad litem role,¹⁴⁹ the Uniform Act closely parallels the ABA Custody Standards.¹⁵⁰

¹⁴⁹ Like the AAML Custody Standards, the ABA Custody Standards reject the dual attorney/guardian ad litem role because of the inherent conflicts in that hybrid category and the ambiguity surrounding the term “guardian ad litem.” See Elrod, *supra* note 148, at 115-17.

¹⁵⁰ In an effort to constrain the lawyer’s personal biases, the Standards require the best interests attorney to use “objective criteria set forth in the law related to the purposes of the proceeding.” *Id.* at Standard V. F. The Commentary states that determining a child’s best interests is “a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them.” *Id.*

Critics who oppose the best interests attorney have advanced three major points. First, critics contend that lawyers who engage in best interests representation are acting outside ethical boundaries since they are unmoored from the bedrock of client direction.¹⁵¹ Second, critics contend that lawyers lack expertise to determine children's interests.¹⁵² Legal training, it is said, does not prepare a person to make the nuanced and complex evaluations required in arriving at a position that is in the child's best interests, and lawyers who exercise unbridled discretion in determining children's interests may give effect to personal biases and prejudices.¹⁵³ Third, child

¹⁵¹ Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955 (1966).

¹⁵² Guggenheim, *Reconsidering the Need for Counsel*, *supra* note 8; Annette R. Appell, *Decontextualizing the Child Client*, *supra* note 151 (lawyers lack training to effectively determine children's interests in child welfare proceedings).

¹⁵³ *See, e.g.*, Annette R. Appell, *Decontextualizing the Child Client*, *supra* note 151, at 1966; Standard 2.7, Comment, *AAML Standards*, *supra* note 130 (lawyers are untrained to

advocates argue that children, as possessors of basic human rights, are entitled to have their views advocated in proceedings affecting their interests.¹⁵⁴ Children should be empowered as rights-bearers, rather than being viewed as vulnerable and the subject of protection.¹⁵⁵

determine what is best for children and therefore are not competent to act as “de facto guardian” in child custody proceedings).

¹⁵⁴ See Jessica Matthews Eames, *Seen But Not Heard: Advocating for the Legal Representation of a Child’s Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 EMORY L. J. 1431 (1999); Federle, *Children’s Rights*, *supra* note 40; Federle, *The Ethics of Empowerment*, *supra* note 34.

¹⁵⁵ See generally Barbara Bennett Woodhouse, *Talking About Children’s Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L. Q. 105, 130 (2002)(“From a child’s rights perspective, one of the most important decisions a judge can make is the decision whether to appoint an attorney to represent the child.”); Federle, *Children’s Rights*, *supra* note 40.

By providing guidelines for the best interests attorney, the new Act attempts to constrain the lawyer's discretion while also imposing affirmative duties on the lawyer that are consistent with a traditional attorney's role. The ethical rules do require that a lawyer remain in a traditional lawyer-client relationship "as far as reasonably possible."¹⁵⁶ That underlying duty is effectuated in the new Act by the umbrella requirements of legal representation that apply to both the best interests attorney and the child's attorney,¹⁵⁷ and by the important obligation of the best interests attorney to give the child's wishes due weight in determining the position to advocate.¹⁵⁸ Moreover, under the Act the child's views are to be made known to the court in every case, regardless of the category of representative, if the child's so desires.

¹⁵⁶ Model Rule 1.14 provides that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." ABA MODEL R. PROF. CONDUCT R. 1.14(a) (2002).

¹⁵⁷ Section 11, UNIF. REP. CHILDREN IN ABUSE NEGLECT & CUSTODY PROC. ACT.

¹⁵⁸ *Id.*, Section 13(d).

The best interests lawyer diverges from the traditional duty of loyalty,¹⁵⁹ however, in not being bound to follow the child's expressed wishes. The ethical authority for that divergence rests on the nature of childhood—better viewed as a process of self-determination rather than a status—during which the child is developing an identity, formulating viewpoints, and becoming less dependent on adults.¹⁶⁰ Because of that immaturity, the child lacks legal decision-making power, in most respects.¹⁶¹ Under traditional rules of professional conduct, lawyers have the authority to act on behalf of persons with diminished capacity to protect their interests.¹⁶² The new Model Rule 1.14 recognizes that the lawyer's role must change if the client's capacity to make “adequately considered decisions . . . is diminished.”¹⁶³ The commentary does not define

¹⁵⁹ In general, Model Rule 1.2 requires lawyers to abide by their clients' decisions concerning the objectives of representation. *See* ABA MODEL R. PROF. CONDUCT R. 1.2(a) (2002)

¹⁶⁰ *See* Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *Corn. L. Rev.* 895, 918-48 (1999)(surveying child development literature and highlighting child's inchoate understanding of self in relationship to legal process); Harry Brighthouse, *How Should Children Be Heard?*, 45 *ARIZ. L. REV.* 691, 698-99 (2003)(childhood is process of self-definition and does not fit easily with rights-bearing status as moral or philosophical matter). The fluid nature of childhood and adolescence, from a cognitive development perspective, informed the Supreme Court's reasoning in its decision striking down the juvenile death penalty. *See* *Roper v. Simmons*, 569 U.S. 551, 569-75 (2005). *See generally* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *HOFSTRA L. REV.* 547 (2000).

¹⁶¹ *See* Wallace J. Mlyniec, *A Judge's Ethical dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873 (1996)(applying child development research to various contexts in which children's choices carry legal weight, including abortion, custody, medical treatment, and delinquency).

¹⁶² *See, e.g.,* *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998)(construing ethical constraints as flexible enough to encompass attorney/guardian ad litem model in child representation); Emily Buss, “*You're My What?*” *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1718-19 (1996)(noting ambiguity of former Rule 1.14 in its authorization for lawyer to depart from client direction if client cannot make “adequately considered decisions”).

¹⁶³ ABA MODEL R. PROF. CONDUCT R.1.14(a) (2002).

“adequately considered decisions” but notes that when the client is a minor, “maintaining the ordinary client-lawyer relationship may not be possible in all respects.”¹⁶⁴ At the same time, the comment emphasizes that even young children have opinions that are entitled to weight in court proceedings affecting their custody.¹⁶⁵ The rule also explicitly permits attorneys to take “reasonably necessary protective action” where a client with diminished capacity is at risk of harm,¹⁶⁶ and its wording is sufficiently flexible to permit a wide range of lawyering functions on behalf of that client.¹⁶⁷ Again, the commentary explains that in taking protective action, the lawyer should be guided by “the client’s best interests and the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.”¹⁶⁸ Protective actions may include consulting family members and professionals to help make decisions, including seeking the appointment of a guardian ad litem.¹⁶⁹ While the joint appointment of a court-appointed advisor and a best interests attorney might be ideal, financial cost will often pose a barrier to such dual appointments.¹⁷⁰ In

¹⁶⁴ *Id.* Comment.

¹⁶⁵ The Comment states, “[C]hildren as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” *Id.*

¹⁶⁶ *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT R. 1.14 (2002).

¹⁶⁷ *See* JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 34-45 (2004) (exploring ways in which best interests lawyering for children comports with general guidelines of Rule 1.14, and emphasizing that court should be guided by respect for client).

¹⁶⁸ ABA MODEL R. PROF. CONDUCT R. 1.14 Comment (2002).

¹⁶⁹ *Id.* at 1.14(b).

¹⁷⁰ In *Clark v. Alexander*, 953 P.2d 145, 153 (Wyo. 1998), for example, the court stated, in

any even, the Model Rules seem flexibly drawn to permit the lawyer to step into the best interests role when representing a client with diminished capacity. Thus, under the new Act, Section 11's umbrella requirements of legal representation and Section 13's specific guidelines for best interests attorneys seem to comport with general ethical principles by mandating child-centered representation in which the best interests attorney owes respect but not absolute allegiance to the child client's articulated wishes.

Those who criticize best interests lawyering because lawyers lack expertise to make such determinations seem to envision a lawyer arriving at a litigation position in a vacuum, driven solely by personal beliefs. Instead, the best interests lawyer must base his or her legal position on input from the child and the child's relatives, friends, teachers, treating physicians, and others closely affiliated with the child.¹⁷¹ In reality, no single person should be viewed as possessing expertise to dispositively expound on the child's best interests. The mental health expert, for example, may offer opinions about the immediate and long-term psychological consequences that a child is likely to experience from competing custodial arrangements, but the child's ultimate interests surely encompass more than that.¹⁷² The best interests lawyer is in a position to bring to

the context of a custody dispute, "We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process."

¹⁷¹ As recognized by Jean Koh Peters, experts who have been or will be involved with the child over the long terms may be of more value to the court than the one-time expert consultant appointed for the litigation. See JEAN KOH PETERS, *supra* note 34, at 355-64.

¹⁷² See, e.g. Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551 (1997)(contending that courts should be cautious about permitting mental health experts to express opinions about a child's best interests, in light of the fallibility of mental health predictions).

the court's attention multiple sources of information bearing on the child's interests. When doing so, the attorney's independent and informed interpretation of the evidence will necessarily shape the presentation, but the attorney's advocacy is constrained by the applicable law and the availability of evidence.

The risk that best interest lawyers may act with unconstrained discretion is a legitimate concern, one that the Act addresses through the provision of guidelines governing the lawyer's conduct. The Act's construct of best interests lawyering seeks to protect the child's welfare by requiring the lawyer to make an independent assessment of the child's interests based on a thorough investigation according to applicable legal standards. Working in tandem with a CASA or a mental health expert can strengthen the lawyer's understanding of the child's circumstances and needs.¹⁷³ Moreover, best interests attorneys as well as child's attorneys can enhance their understanding of the child in context by speaking with a child's parents, caregivers, teachers, and

¹⁷³ See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 85-87 (2000) (lawyers working in combination with court appointed special advocates would improve child representation).

others with whom the child has frequent contact.¹⁷⁴ In short, the best interests lawyer who complies with the guidelines of the Act will keep the child's unique identity and needs at the center of the representation.

¹⁷⁴ See Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263 (2006)(exploring value of incorporating parental assessments of best interests in representing children); Mary Kay Kisthardt, *Working in the Best Interests of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1 (2006)(discussing ways in which interdisciplinary collaborations can improve lawyers' competence in representing children).

Moreover, other standards that emphasize the client-directed model nevertheless invite the exercise of considerable discretion under the rubric of “substituted judgment.”¹⁷⁵ The complex substituted judgment assessments envisioned by Jean Koh Peters and both the Fordham and UNLV Recommendations are so nuanced that they would seem to invite at least as much discretion in determining a position to advocate as the best interests determination.¹⁷⁶ The approach proposed by Professor Peters requires the attorney to understand the child in context, to see the world through the eyes of the child by intricately mapping a system that revolves “around the twin suns of the child’s world and the theory of the case.”¹⁷⁷ That ideal is worth striving for, and Professor Peters’ book contains some admirable guidelines to help attorneys accomplish this goal. The UNLV Recommendations likewise direct lawyers to follow a child’s directions and, for children with diminished capacity, to pursue goals that “reflect what the client would want and the decision the child would make if the child could formulate a position.”¹⁷⁸ The problem is that a young child who has not established a firm personality or identity remains opaque. A lawyer’s interpretation of what the child would have wanted were the child able to express a position may mask arbitrary value judgments more than would a transparent assessment of best interests.¹⁷⁹

¹⁷⁵See Duquette, *Two Distinct Roles*, *supra* note 120, at 1242-43 (suggesting that the ABA Abuse and Neglect Standards, the NACC Revised Version, and the Fordham Recommendations all contain opportunity for lawyer discretion that is unreviewed and unconstrained by objective criteria).

¹⁷⁶*Id.*

¹⁷⁷JEAN KOH PETERS, *supra* note 34, at 135.

¹⁷⁸ *UNLV Recommendations*, *supra* note 1, Rec. IV. A. 2(c)(ii).

¹⁷⁹ *Cf.* In re Christopher I., 106 Cal. App. 4th 533, 131 Cal. Rptr 2d 122 (Cal. App. 4th 2003)(best interests of child standard, rather than substituted judgment standard, governed determination of whether to withhold life-sustaining medical treatment for comatose

18-month-old infant, since child had never been competent to make his own decisions or express his emotions on issue before court).

Similarly, the AAML approach of limiting a lawyer's function to investigation and presentation of evidence is unlikely to accomplish the desired result of eliminating all subjective advocacy by lawyers for impaired children.¹⁸⁰ Even in the circumscribed role for lawyers that the AAML Standards envision, a lawyer's decision making about which facts to bring to the court's attention and which facts to emphasize will inevitably involve preliminary judgments about the merits of the case. In a custody dispute, for example, an attorney may need to decide whether to call the court's attention to evidence of the child's emotional outbursts during visitation with one parent. The attorney's choice will depend on the attorney's prediction of the impact of such evidence. One cannot evaluate the importance of evidence without asking, "For what purpose?" A lawyer's decision that the evidentiary record before the judge needs amplification will inevitably rest on a value judgment about the significance of the omitted evidence. More fundamentally, the AAML approach leaves the younger child without a legal advocate. As Ann Haralambie has argued, "the diminished role of attorneys for 'impaired' children . . . deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney."¹⁸¹ The drafters of the Uniform Act concluded that the better path was to acknowledge that lawyers for children must sometimes operate without client direction and to provide guidance

¹⁸⁰ See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM ACAD. MATRIMONIAL LAW. 57 (1995).

¹⁸¹ *Id.* at 57.

to ensure that the representation focuses on objective legal criteria and the individual child in context.

If critics are animated in part by the fear of excessive deference to children's lawyers, the remedy would seem to be in educating judges, not in eliminating the advocacy function of lawyers.¹⁸² The court is the ultimate decision maker and should not rely exclusively on the position of a child's attorney, a best interests attorney, a court-appointed advisor, or an expert witness. Although the role of counsel may vary depending on the developmental level of the child, the needs of the court, and other factors, the new Uniform Act rests on the premise that having two models of legal representation for children available can help courts achieve accurate, informed, and sensitive assessments of the child's wishes and circumstances.

Critics also fear that best interests lawyering disempowers children. In this respect, the debate about the role of children's lawyers may be the result of differing perceptions about children, lawyers, and the adversary system. Put simply, those who argue for the client-direction model view children as rights-bearers whose voices have too long been silenced, and they view lawyers as dangerous players in the system whose biased determinations of children's interests and desires to be "heros" have hurt children. As Professor Jane Spinak writes, the best interests attorney model permits lawyers "to protect his or her client and not to represent them."¹⁸³ In the

¹⁸² See *id.* at 92-93; Randi Mandelbaum, *supra* note 173 at 79-80 (judicial training should teach judges to achieve more in depth understanding of children's circumstances).

¹⁸³ Spinak, *supra* note 117, at 1390.

view of the client-direction champions, the adversary system works best when each player, including the child, has a vigorous advocate. The judge's task is to determine the truth, or, at a minimum, to reach a resolution that will best serve the child's interests. Similarly, judges perform most competently when the lawyers before them do not usurp the judicial role but advocate their client's desires on a level playing field.

In contrast, those who defend a best interests role as an option for children's lawyers recognize the vulnerability and core dependency of children. Children lack the legal capacity to make decisions for themselves in most circumstances and often lack the cognitive and emotional capacity to be fully, or consistently, self-determining.¹⁸⁴ Children in the throes of a custody dispute or children who are the subject of abuse and neglect proceedings may be particularly vulnerable, and their expressed desires may be acutely unstable and unreliable. Studies have shown that the cognitive and linguistic capacities of abused children, for example, are often significantly delayed.¹⁸⁵ A lawyer whose representation is controlled by the erratic directions of a traumatized child whose parent is accused of abuse may not present as full or reliable an

¹⁸⁴ Cf. Buss, *Confronting Developmental Barriers*, *supra* note 160 (children's lack of capacity to understand lawyer-client relationship and client impact in litigation undermines empowerment ideal). While Professor Buss may not endorse the best interests lawyering model, she does question the pure client-direction model, since it assumes that the client appreciates his or her influence over the lawyer and the legal process. She recommends that children's lawyers reconceptualize their role as one of teaching the child about the opportunity to assert control. See *id.* at 950-60.

¹⁸⁵ See Carol D. Stock & Philip A. Fisher, *Language Delays Among Foster Children: Implications for Policy and Practice*, 85 CHILD WELFARE 445 (2006)(foster children experience significant developmental delays that too often go untreated); ANN GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN 59 (1999)(maltreated children fall significantly below normal curve for both receptive and expressive language skills).

evidentiary picture to the court as the court needs. Moreover, because an increasing number of divorce litigants have no legal representation, the child's appointed lawyer in a custody dispute may be the only lawyer in the courtroom.¹⁸⁶ Thus, courts may prefer a lawyer's evaluation of the child's interests over the child's own assessment, since the child may be in intense distress and

¹⁸⁶ See, e.g., Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002)(citing studies showing increase in percentage of pro se litigants in family court across United States); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L. J. 105, 107 (2001)(reporting that percentage of cases in which at least one litigant appears pro se is significantly higher in family law cases than in any other area of law and constitutes majority of family law cases in studied jurisdictions). See generally JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (American Judicature Society/State Justice Institute 1998)(reporting on survey of judges indicating significant increase in self-representation by litigants).

unlikely to fully grasp the consequences of certain decisions.¹⁸⁷ In addition, if the client-directed role were the sole lawyering model available, lawyers might too readily push their young clients for guidance and direction, sometimes urging the child to make a choice despite the child's desire to remain neutral.¹⁸⁸ By endorsing a best interests option, the Act respects the dignity of the child while also recognizing that the voiced preferences of children may be distorted by their circumstances.

The drafters of the new Uniform Act concluded that a best interests role must be an available option for children's attorneys because there will always be some percentage of children who are incapable of directing counsel, whether because of immaturity, disability, emotional distress, or otherwise. Moreover, there will always be judges who view the best interests model of child representation as more likely to result in a full presentation of evidence than purely child-directed lawyering, even for children who are able and willing to tell their lawyers what to

¹⁸⁷ See Subha Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, 24 WHITTIER L. REV. 619, 634-35 (2003); Duquette, *Two Distinct Lawyer Role are Required*, *supra* note 34, at 446.

¹⁸⁸ See Carol Smart, *From Children's Shoes to Children's Voices*, 40 FAM. CT. REV. 307, 318 (2002)(interviews with children of divorce revealed that children wanted to have voice in legal process but "a majority of children were clear that they did not want to be forced to make choices"); Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003)(questioning whether observing a child's "right to be heard" can unreasonably burden children with responsibility of making adult decisions).

do. The best interests attorney under the Uniform Act's approach respects the child's individuality as well as the child's vulnerability; the attorney determines the position to take in the litigation based on a complex of factors, including but not limited to the child's expressed wishes. When a mature child is capable of directing counsel, the child's voice is an essential piece of the overall picture presented to the decision maker, and the child's own sense of dignity and agency will be enhanced by traditional legal representation. But when the child cannot or will not reliably direct counsel, the lawyer must determine a position that will serve her client's interests. The Uniform Act provides a structure to help that lawyer go through a careful deliberative process centered on the child in developing the position to take in the litigation. In the adversary system the best interests attorney's advocacy and evidentiary showings are simply that – a lawyer's presentation. The role should not usurp the judge's responsibility to determine best interests but may significantly enrich the judge's understanding of the child's circumstances and welfare.

Conclusion

Informed, thoughtful people who care very much about children's welfare may have very different ideas about how best to effectuate their concerns.¹⁸⁹ The new Uniform Act rests on the premise that greater clarity in role definition for children's representatives and the imposition of higher standards of performance will better serve the needs of children. The Act is designed with flexibility to meet the needs of all children, regardless of capacity, and the needs of courts as they confront issues of core importance and enormous difficulty.

¹⁸⁹ The UNLV Conference itself yielded concrete evidence of the diverse and impassioned viewpoints held by experts in the field. *See Special Issue on Legal Representation of Children*, 6 NEV. L.J. 571-1424 (2006).

Carrying forward the approach of the ABA Custody Standards, the Act recognizes two models of legal representation and requires child-centered methods of lawyering for both roles. While respecting the valid concerns of those who criticize the best interests attorney model, NCCUSL opted to maintain that model as an option while providing clear guidelines that constrain the attorney's discretion. For both models of lawyering, the child client is at the center of the representation, and the lawyer's advocacy must be grounded on the child's unique individuality and circumstances, not the lawyer's subjective whim. The Act also recognizes that the lay representative can play a valuable part in enhancing the court's understanding of the case, through testimony, reports, or other recommendations. At the same time, the Act provides limitations on the lay advocate's role in order to differentiate attorney and non-attorney functions and to ensure due process protections for participants.

By endorsing and carefully defining two lawyering roles as well as the role of court-appointed advisor, by mandating the appointment of counsel for every child in an abuse and neglect case, and by setting out detailed factors to guide the appointment decision in custody cases, the Act has a real chance of achieving practical reform. It seeks to guarantee children a voice in the legal process while also helping the courts resolve these challenging cases with as much informed wisdom as possible.